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New York's New Rule 187 Goes into Full Effect on February 1: A Step-by-Step Summary of the Major Requirements for Producers

Starting on February 1, 2020, New York's new Best Interest regulation ("Rule 187") will be fully in effect, applying to annuity and life insurance transactions. AALU has been working with producers, insurers, and the New York Department of Financial Services ("NYDFS") to try to improve the regulation throughout the process, and to educate producers about the new requirements.

This work won't stop, and producers should be prepared for changes throughout the year in processes used by insurers and intermediaries as mid-course adjustments reflect more familiarity with the Rule or new NYDFS guidance. Producers affected by Rule 187 should reach out to their partners to make sure they understand what new forms and documentation may be required.

To assist producers, we've developed a general review of Rule 187's producer requirements in a step-by-step format. This is not a complete review of every section of Rule 187, and it can't take the place of required training or legal counsel about each producer's particular situation, but it can help producers get a basic understanding of new rules of the road for New York life insurance and annuity transactions.

The first question is whether the recommendation will be made with regard to a "sales" or an "in-force" transaction. The primary difference between them is that a sales transaction generates new compensation and an in-force transaction does not. Therefore, all new business will be a sales transaction, but transactions related to an existing policy or contract could be either depending on whether new sales compensation results from the transaction. An in-force transaction does not require the new disclosures, data gathering, or documentation identified below. For sales transactions, here are the major steps for producers:

Step 1: Before Meeting with Clients—Title Restrictions, Limitations, and Training

Before producers make recommendations to clients, producers need to make sure they abide by title restrictions, have the right disclosures prepared, and are adequately trained.

First, producers cannot call themselves a financial planner, a financial advisor, or use a similar title unless they are licensed or certified and actually provide non-insurance financial services.

Second, producers must disclose limitations on the range of policies they can recommend before making a recommendation. The disclosure needs to explain the nature of agreements that cause the limitation and the circumstances under which the producer will and won't limit his or her recommendation.

Third, a producer is not allowed to recommend a transaction "about which the producer has inadequate knowledge."

Step 2: Collect Suitability Information from the Client

One of the most obvious changes is the requirement to make a "reasonable" effort to get from the client a list of data factors that will be considered in making the recommendation. Producers should document whether the client declines to provide any of these items. This "suitability information" includes "some or all" of the following:

1. age;
2. annual income;
3. financial situation and needs, including the financial resources used for the funding of the policy;
4. financial experience;
5. financial objectives;
6. intended use of the policy, including any riders;
7. financial time horizon, including the duration of existing liabilities and obligations;
8. existing assets, including investment and insurance holdings;
9. liquidity needs;
10. liquid net worth;
11. risk tolerance;
12. willingness to accept non-guaranteed elements in the policy, including variability in premium, cash value, death benefit, or fees;
13. tax status; and
14. any other relevant information.

If the policy is term insurance with no cash value, numbers 4 and 13 may be omitted.

Step 3: Developing the Recommendation

Though there are a number of specific requirements related to developing the recommendation, the central themes are thorough consideration, acting on behalf of the client, and good documentation.

Specifically, in developing the recommendation, the producer must evaluate the relevant suitability information with “the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under” similar circumstances. The producer may weigh various factors relevant to the client’s best interest, such as cost, benefits, financial strength of the insurer, “and other factors the differentiate products or insurers.” The producer must have a reasonable basis to believe that the client will benefit from features of the policy, that the policy and any subaccounts or riders are suitable for the client, and that the client has the financial ability to meet his or her financial obligations under the policy.

The producer may consider only the interests of the client and cannot let any compensation or incentive influence the recommendation.

Finally, the producer must have a reasonable basis to believe the client has been reasonably informed of various features of the policy and the potential consequences, both favorable and unfavorable.

Step 4: Delivering the Recommendation

The Rule requires the producer to give a specific disclosure along with the recommendation. In a “reasonable summary format,” the disclosure must include all of the relevant suitability considerations and product information that went into the recommendation, including both the favorable and unfavorable issues. The producer must document the basis for the recommendation and the facts and analysis supporting it. If disclosures were made orally, NYDFS expects to see later written documentation of the disclosures, or recordings or transcripts of the actual oral conversation.

Step 5: What to Do if the Client Disagrees

The client may decide to disregard the producer’s recommendation. If that happens, the producer should at that time document that he or she did not recommend the transaction the client directed.

Step 6: Keep the Documentation

The producer needs to keep the documents necessary to show that he or she followed Rule 187 for each recommendation, such as copies of the disclosures, the suitability information collected (including noting when or if a client did not provide some of the information), and the basis for the recommendation showing how the producer evaluated different options and factors.

Conclusion:

Some producers may find that the intermediaries or insurance companies they work with require producers to use specific forms and training for Rule 187 compliance. Some producers may find that their insurance companies or intermediaries expect producers to be responsible for their own compliance. It is quite likely that some of the procedures and requirements adopted in response to Rule 187 may change in the next several months, as there may be new guidance from NYDFS. Producers need to remain flexible and alert to these changes. AALU will continue to work on behalf of producers to seek helpful guidance and to assist producers in understanding their role in the new rules.